A

IBRAHIM MOHAMAD & ANOR

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN FCJ
JAMES FOONG FCJ
ABDULL HAMID EMBONG FCJ
[CRIMINAL APPEAL NOS: 05-101-2009(D) &
C 05-97-2009(D)]
11 MARCH 2011

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 38,499.68 grams cannabis - Whether accused had custody*
D *and control of drugs - Whether failure to call registered owner of vehicle led to gaps in prosecution case - Whether act of accused fleeing should be weighed against circumstances of case - Whether accused lacked mens rea of knowledge - Whether conviction and death sentence substituted with one of possession under s. 6 DDA - Evidence Act 1950, ss. 8(2), 9, 32(1)(i)*
E *- Dangerous Drugs Act 1952, ss. 37(d),(da)(vi), 39A(2), 39B(2) - Penal Code, s. 34*

EVIDENCE: *Witness - Failure of prosecution to call witness - Failure to call registered owner of vehicle wherein drugs were found - Whether*
F *gaps in prosecution case - Evidence Act 1950, ss. 8(2), 9, 32(1)(i) - Dangerous Drugs Act 1952, ss. 6, 37(d),(da)(vi), 39A(2), 39B(2) - Penal Code, s. 34*

The police acting on a tip-off apprehended the first and second accused ('both accused') at a road block during the inspection of
G a vehicle driven by the first accused. It was subsequently discovered that the back seat rest of the vehicle contained 40 transparent plastic packages of cannabis. Both accused were then tried, convicted and sentenced to death under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 38,499.68
H grams cannabis. Their appeal before the Court of Appeal was heard and subsequently dismissed. They now appealed to the Federal Court.

I

Held (allowing appeal and substituting with conviction under s. 6 of Act)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) Possession is an important ingredient in a charge of trafficking. Unless direct evidence of trafficking is adduced, the prosecution must prove the ingredient of "possession" and the trial judge must make an affirmative finding of "possession" before the presumption of trafficking under s. 37(d) of the Act can be invoked. (para 6)

(2) Neither one of the accused were the registered owner of the vehicle. The registered owner of the vehicle was never called as prosecution witness. The courts below concluded that the second accused had custody and control over the drugs on the mere fact that he was a passenger of the vehicle when he was arrested and that several months prior to his arrest the second accused was summoned for driving the vehicle without licence in Kedah. There was nothing to suggest as to what happened to the vehicle in between the period he was summoned in Kedah until the date of his arrest. A fact cannot be proved by presumption. A finding must be made based on proved facts or inferences drawn from proved facts. It followed that there was no evidence to prove that both accused were exclusively in custody and control of the vehicle prior to their arrest. (para 8)

(3) There were many favourable inferences that could be made to both accused from the existing factual matrix of the case. The vehicle could have been rented to a third party or the registered owner of the vehicle could have taken possession of the vehicle after the second accused's summons incident in Kedah. Those favourable inferences were never considered by the courts below which casted a reasonable doubt on the element of custody and control. The failure of the courts below to consider that issue was misdirection in law. (para 9)

(4) Notwithstanding that the prosecution has complete discretion as to the choice of witnesses to be called at the trial, it has a duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution's case. In the present case, the question as to how the vehicle came to be in the custody and control of both accused still remained unanswered. The

A registered owner of the vehicle was the one that held the key to the unfolding of the events without which there were gaps in the prosecution's case. (para 10)

(5) There was a danger of relying on a tip-off case as there was a possibility that the drugs might have been planted in order to implicate the accused (see *Abdullah Zawawi Yusoff v. PP*). The prosecution must exclude possibilities that other individuals might have had access to the drugs. In the present case, the prosecution failed to adduce evidence that the registered vehicle owner and/or other individuals had no access to the vehicle prior to the date of arrest of both accused. Further, the courts below erroneously took the position that the failure to call the registered vehicle owner was not fatal as he was not together with both accused when they were arrested. (para 12)

(6) If for some valid reasons the registered vehicle owner could not be called to give evidence, his statement ought to have been adduced and tendered as evidence pursuant to s. 32(1)(i) of the Evidence Act 1950. That raised the question as to who was in actual control of the vehicle immediately prior to the date of arrest of both accused. Further, there was no evidence to indicate for how long both accused had possession of the vehicle. (para 13)

(7) Whilst the conduct of the accused fleeing the scene was a relevant factor for consideration, such conduct must be weighed against the circumstances of the case. The prior conduct of both accused to show they lacked the *mens rea* of knowledge was relevant under s. 8(2) of the Evidence Act 1950. The first accused did not make a U-turn or attempt to run away before approaching the relevant road block which could be easily seen by him on the straight road. That gave rise to an inference that both accused had no knowledge of the drugs in the vehicle. Further, they had co-operated with the police. If they had prior knowledge of the drugs, they would have bolted immediately upon being asked to alight from the vehicle or upon reaching the road block. The conduct of both accused was consistent with their contention that they had only fled upon being told that there were drugs in the vehicle. Their conduct was consistent with the act of an innocent man who would have panicked to evade arrest when wrongly suspected of committing a crime. Both accused

had put forward sufficient explanation as to their conduct of running away from the scene of the crime. They had discharged the onus of explaining their conduct as provided for under s. 9 of the Evidence Act 1950. (paras 17-19 & 21)

(8) It was not safe to convict both accused on the charge of trafficking under s. 39B(1)(a) DDA. However, since both accused were in possession of the vehicle where the drugs were found, the presumption under s. 37(d) DDA was applicable and they were deemed to be in possession of the drugs. As the law did not permit double presumption, both accused could not be said to be trafficking in the drugs in the absence of any other evidence to show that there was direct trafficking. Hence, the conviction was substituted with one of possession under s. 6 DDA, punishable under s. 39A(2) DDA read with s. 34 of the Penal Code. As a large quantity of the drugs were found in the possession of both accused, a sentence of 20 years' imprisonment and the mandatory 10 strokes of whipping were appropriate. (para 8)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh pertama dan kedua ('kedua-dua tertuduh') telah ditahan oleh polis di satu sekatan jalanraya berdasarkan satu maklumat dan setelah pemeriksaan yang dibuat ke atas kereta yang dipandu oleh tertuduh pertama. Berikutnya, sebanyak 40 bungkusan plastik lutsinar yang mengandungi ganja dijumpai dari dalam tempat merehatkan kepala tempat duduk belakang kereta tersebut. Kedua-dua tertuduh kemudian dibicarakan di bawah s. 39B(1) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 38,499.68 gram ganja, dan disabit dan dihukum mati. Rayuan mereka ke Mahkamah Rayuan telah didengar dan ditolak, dan mereka kini merayu ke Mahkamah Persekutuan.

Diputuskan (membenarkan rayuan dan menggantikan sabitan dengan sabitan dibawah s. 6 Akta)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Milikan adalah satu ingredien penting bagi pertuduhan pengedaran. Kecuali jika keterangan terus mengenai pengedaran dikemukakan, pendakwaan mestilah membuktikan "milikan" dan hakim bicara mestilah membuat dapatan afirmatif "milikan" sebelum anggapan pengedaran di bawah s. 37(d) Akta boleh digunakan.

A **(2)** Kedua-dua tertuduh bukan merupakan pemilik berdaftar kenderaan. Pemilik berdaftar kenderaan pula tidak dipanggil sebagai saksi pendakwaan. Mahkamah-mahkamah di bawah memutuskan bahawa tertuduh kedua mempunyai jagaan dan kawalan terhadap dadah semata-mata atas fakta bahawa beliau
B adalah penumpang kenderaan apabila beliau ditangkap dan bahawa beberapa bulan sebelum itu beliau telah disaman kerana memandu kenderaan tersebut tanpa lesen di Kedah. Namun, tiada suatu apapun yang boleh menunjukkan apa yang berlaku kepada kenderaan di antara tempoh beliau disaman di
C Kedah dan tarikh beliau ditangkap. Suatu fakta tidak boleh dibuktikan melalui andaian. Sebarang dapatan harus dibuat dengan berasaskan fakta-fakta terbukti atau melalui inferens dari fakta-fakta terbukti. Ianya dengan itu mengikut bahawa tiada bukti yang menunjukkan bahawa kedua-dua tertuduh
D mempunyai jagaan dan kawalan eksklusif terhadap kenderaan sebelum mereka ditangkap.

(3) Dari fakta-fakta sedia ada kes, terdapat banyak andaian yang boleh dibuat yang memihak kepada kedua-dua tertuduh.
E Kenderaan mungkin telah disewakan kepada pihak ketiga atau pemilik berdaftar kenderaan mungkin telah mengambil kereta selepas tertuduh kedua disaman di Kedah. Inferens-inferens yang memanfaatkan ini tidak pernah ditimbang oleh mahkamah-mahkamah di bawah sekaligus membangkitkan keraguan
F munasabah terhadap elemen-elemen jagaan dan kawalan. Kegagalan mahkamah-mahkamah di bawah menimbang isu ini adalah satu salah arahan undang-undang.

(4) Walaupun pendakwaan mempunyai budibicara penuh tentang
G siapakah saksi-saksi yang hendak dipanggil oleh mereka di perbicaraan, ia bertanggungan untuk memanggil semua saksi-saksi penting yang perlu bagi menyerlahkan naratif kes pendakwaan. Dalam kes ini, persoalan mengenai bagaimanakah kenderaan didapati berada dalam jagaan dan kawalan kedua-
H dua tertuduh masih tidak dijawab. Pemilik berdaftar kenderaan adalah kunci kepada pendedahan apa yang berlaku dan tanpanya wujud banyak lompang pada kes pendakwaan.

(5) Kebergantungan kepada kes maklumat ada bahayanya kerana wujud kemungkinan bahawa dadah sengaja diletak bagi
I mengenakan tertuduh (lihat *Abdullah Zawawi Yusoff v. PP*). Pendakwaan mesti menyisihkan kemungkinan bahawa orang-orang lain mungkin mempunyai akses kepada dadah. Dalam kes

semasa, pendakwaan gagal mengemukakan keterangan bahawa pemilik berdaftar kenderaan dan/atau orang-orang lain tidak mempunyai akses kepada kenderaan sebelum tarikh kedua-dua tertuduh ditangkap. Selain itu, mahkamah-mahkamah di bawah khilaf apabila mengambil pendirian bahawa kegagalan memanggil pemilik berdaftar kenderaan sebagai saksi tidak fatal kerana beliau tidak ada bersama kedua-dua tertuduh semasa mereka ditangkap.

(6) Jika atas sebab-sebab yang sah pemilik berdaftar kenderaan tidak boleh dipanggil untuk memberi keterangan, kenyataan beliau sepatutnya diambil dan dikemukakan sebagai keterangan di bawah s. 32(1)(i) Akta Keterangan 1950. Ia membangkitkan persoalan mengenai siapakah yang sebenarnya mempunyai kawalan kenderaan sejurus sebelum tarikh penangkapan kedua-dua tertuduh. Selain itu, tidak terdapat keterangan yang menunjukkan berapa lamakah kedua-dua tertuduh mempunyai milikan kenderaan tersebut.

(7) Sementara kelakuan tertuduh melarikan diri adalah satu faktor relevan untuk dipertimbangkan, ia harus dilihat berasaskan halkeadaan kes. Kelakuan terdahulu kedua-kedua tertuduh bagi menunjukkan mereka tidak mempunyai mens rea adalah relevan di bawah s. 8(2) Akta Keterangan 1950. Tertuduh pertama tidak membuat pusingan-U atau cuba melarikan diri sebelum mendekati sekatan jalanraya berkenaan walaupun ia jelas dapat dilihat olehnya kerana berada di jalan yang lurus. Itu membangkitkan inferens bahawa kedua-dua tertuduh tidak mempunyai pengetahuan tentang dadah di dalam kenderaan. Selain itu, mereka bekerjasama sepenuhnya dengan polis. Jika mereka mempunyai pengetahuan terdahulu mengenai dadah, mereka pasti serta merta melarikan diri apabila disuruh keluar dari kenderaan atau sebaik sampai ke sekatan jalanraya. Kelakuan kedua-dua tertuduh adalah konsisten dengan penegasan mereka bahawa mereka hanya melarikan diri apabila diberitahu terdapat dadah di dalam kereta. Kelakuan mereka adalah konsisten dengan tindakan orang yang tidak bersalah yang panik untuk mengelakkan tangkapan apabila dengan salahnya dituduh melakukan kesalahan. Kedua-dua tertuduh telah mengemukakan penjelasan yang mencukupi mengenai kelakuan mereka apabila melarikan diri dari tempat kesalahan. Mereka telah mememenuhi tanggungjawab untuk menjelaskan kelakuan mereka selaras dengan peruntukan s. 9 Akta Keterangan 1950.

(8) Adalah tidak selamat untuk mensabitkan kedua-dua tertuduh atas pertuduhan mengedar di bawah s. 39B(1)(a) Akta. Bagaimanapun, oleh kerana kedua-dua tertuduh mempunyai milikan kenderaan di mana dadah dijumpai, anggapan di bawah s. 37(d) Akta terpakai dan mereka dianggap sebagai mempunyai milikan dadah. Oleh kerana undang-undang tidak membenarkan anggapan berganda, dan dalam keadaan di mana tiada bukti lain yang menunjukkan perbuatan pengedaran secara terus, kedua-dua tertuduh tidak boleh dikatakan mengedar dadah berkenaan. Oleh itu, sabitan diganti dengan sabitan di bawah s. 6 Akta yang boleh dihukum di bawah s. 39B(2) Akta dibaca bersama s. 34 Kanun Keseksaan. Memandangkan kuantiti dadah yang dujumpai dalam milikan kedua-dua tertuduh adalah besar, maka hukuman 20 tahun penjara dan 10 sebatan yang diwajibkan adalah wajar.

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Jones v. Dunkel [1958-1959] 101 CLR 298 ***(refd)***
Ridwan v. PP [2010] 4 CLJ 570 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Nasrul Annuar Abd Samad v. PP [2005] 1 CLJ 193 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da)(vi), 39A(2), 39B(1)(a), (2)
Evidence Act 1950, ss. 8(2), 9, 32(1)(i)
Penal Code, s. 34

For the 1st appellant - Amer Hamzah Arshad; M/s Zain & Co
For the 2nd appellant - Hoh Lee Ian; M/s Athimulan & Co
For the respondent - Awang Armadajaya Awang Mahmud DPP

[Editor's note: For the Court of Appeal judgment, please see Ibrahim Mohamad & Satu Lagi lwn. PP [2010] 7 CLJ 331.]

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin FCJ:

[1] Both the appellants were jointly charged before the High Court at Kota Bharu in the State of Kelantan with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") for trafficking in 38,499.68 grammes of cannabis ("the said drug") and punishable under s. 39B(2) of the same Act read with s. 34 of the Penal Code. They were tried and convicted by the High Court on the charge and sentenced to death. Their appeal before the Court of Appeal was heard and subsequently dismissed. They now appeal to this court against the decision of the Court of Appeal dismissing their appeal. Before the High Court the first appellant, Ibrahim bin Mohamad was referred to and identified as the second accused and the second appellant, Azhar bin Mahamat as the first accused. We shall refer to them herein as they were before the High Court.

[2] The relevant facts of the prosecution's case are as follows:

Acting on information received, a police raiding party led by PW4 stopped a car bearing the registration number CAC 9493 ("the vehicle") which was travelling from Jeli along KM100 of Kota Bharu/Grik road on 8 November 1999. It is the prosecution's case that the second accused as the passenger together with the driver of the vehicle, the first accused had ran away during the inspection of the said vehicle by PW4. The first accused and the second accused were subsequently apprehended. Both the accused and the vehicle were subsequently brought to PW4's office and upon further inspection PW4 discovered 40 transparent plastic packages suspected to be cannabis at the back seat rest of the vehicle. The Chemist (PW1) upon analysis confirmed these 40 transparent plastic packages contained cannabis as defined under s. 2 of the Act.

[3] The learned trial judge of the High Court at the conclusion of the trial convicted both the accused and held that the prosecution had proved beyond reasonable doubt that the first accused and the second accused were in possession of the said drugs and the element of trafficking was proved by virtue of the fact that the weight of the said cannabis exceeds the statutory threshold under s. 37(da)(vi) of the Act.

[4] The Court of Appeal in affirming the decision of the High Court had, *inter alia*, made the pertinent findings against both the accused that they were in custody and control of the said drugs by virtue of being in custody and control of the vehicle and that they had the knowledge of the said drugs by virtue of their conduct in running away from the scene of the crime.

[5] Both the accused in their petition of appeal before this court had laid out several grounds of appeal. However, we invited learned counsel for the accused and the learned Deputy Public Prosecutor to focus their arguments in this appeal on the question of whether on the evidence adduced by the prosecution it can safely be concluded that both the accused had *mens rea* possession of the drugs in the vehicle independent of the statutory presumption under s. 37(d) of the Act.

[6] It is trite law that possession is an important ingredient in the charge of trafficking. Unless there is direct evidence of trafficking, the prosecution must prove the ingredient of "possession" and the trial judge must make an affirmative finding of "possession" before the presumption of trafficking under s. 37(da) of the Act can be invoked. (See the case of *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170).

[7] In the present case the only evidence which the learned trial judge had relied upon in order to conclude that both the accused were in custody or control of the drugs are as follows:

(i) that the first accused was the driver of the vehicle and the second accused was the passenger on the date of the arrest.

(ii) that the second accused was previously summoned for driving the vehicle without licence in Kulim, Kedah on 14 May 1999, about six months prior to the date of his arrest in the present case.

[8] We are of the view notwithstanding the fact that the first accused and the second accused were in the vehicle when it was stopped at the road block for inspection, neither the first accused nor the second accused was the registered owner of the vehicle. The owner of the said vehicle is one, Mohd Zainuddin bin Tolan ("Zainuddin"), who was never called to testify as a prosecution witness. It is apparent that the courts below had concluded that the second accused had custody and control over the drugs on the mere facts that he was a passenger of the vehicle on the date

of arrest and that several months prior to the date of arrest the second accused was summoned for driving the vehicle without a licence in Kedah. There is nothing to suggest as to what happened to the vehicle in between that period he was summoned in Kedah until the date of his arrest in the present case. A fact cannot be said to have been proved by a presumption. A finding must be based on proved facts or inferences drawn from proved facts. On this point in the case of *Nasrul Annuar Abd Samad v. PP* [2005] 1 CLJ 193, Augustine Paul, JCA (as he then was) referred to and adopted the principle as laid down by Kitto J in *Jones v. Dunkel* [1958-1959] 101 CLR 298 as follows:

> one does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggest, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that case a specific event happened or a specific state of affairs existed.

[9] It is our finding that there is no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest. There are so many favourable inferences that can be made from the existing factual matrix of this case. The vehicle could have been previously rented to a third party or Zainuddin could have taken possession of the said vehicle after the summons incident in Kedah. All these inferences which are favourable to both the accused were never considered by the High Court and the Court of Appeal. These inferences have the effect of casting reasonable doubt on the element of custody and control. The failure on part of the courts below to consider this issue in our view is a misdirection in law.

[10] Whilst it is not denied that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it has a duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution's case. This was not done in the present case. The question as to how the vehicle came into the custody and control of both the accused still remains unanswered. We are of the view that Zainuddin being the registered owner of the vehicle is the one who holds the key to the unfolding of events, without which there are gaps in the prosecution's case. (See the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1).

[11] It is also pertinent to take note in the present case that the police raiding party were acting on a tip-off which led to the arrest and detention of both the accused. The relevance of this established fact can be seen in the decision of the then Supreme Court in *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1 where it was *inter alia* held as follows:

> Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

[12] The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s. 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

[13] It is our considered view that the failure on the part of the prosecution to call the owner of the vehicle or at the very least to tender his statement pursuant to s. 32(1)(i) of the Evidence Act 1950 raises the question as to who was in actual control of the vehicle immediately prior to the date of arrest. The prosecution had failed to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of arrest. No explanation whatsoever was offered by the prosecution as to what had happened to the vehicle from the date when the second accused was summoned in Kulim, Kedah up to the date when the vehicle was stopped at the road block. There is no evidence to indicate for how long both the accused had been in possession of the vehicle.

[14] The mere fact that the second accused was found in the vehicle and that he was previously summoned for driving the vehicle somewhat approximately six months prior to the date of arrest are insufficient for the court to make an inference that he had exclusive custody or control over the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody or control of the vehicle when they were stopped by the police party, this could not be translated into having custody or control over the said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them. (See the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285).

[15] The law is well settled that having only custody or control over the said drugs is insufficient to establish "possession". The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. (See the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17).

[16] In the present case, the learned trial judge made the inference that both the accused had knowledge of the said drugs by relying on their conduct after they were arrested, in particular their act of fleeing from the scene. This was affirmed by the Court of Appeal. On this point we are of the view the trial Judge had clearly overlooked the other inferences that could have been made from the act of fleeing or absconding. Where there are two or more inferences that could be made the inference most favourable to the accused must be drawn. (See the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances of the case. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation. As regards the present case it is noted that the road leading to the "road block" is a straight road and therefore the first accused being the driver of the vehicle could

have easily seen the "road block" miles away. The fact that the first accused did not make a u-turn or attempt to run away before approaching the "road block" can give rise to an inference that both the first accused and the second accused had no knowledge of the drugs in the vehicle.

[18] To further support the contention that the first accused and the second accused had no knowledge of the drugs is the fact that both of them upon being asked to stop at the "road block" had co-operated with the police. The first accused alighted from the car, produced his driving identity card and opened the boot upon being instructed to do so by the police officer. If both of them had prior knowledge of the drugs in question, they could have bolted away immediately upon being ask to alight from the vehicle or even before reaching the "road block". It is apparent that this factual matrix of the case was overlooked and failed to be duly appreciated by the courts below. The conduct of the first accused and the second accused are consistent with their contention that both of them only fled upon being told that there were drugs in the vehicle.

[19] The prior conduct of both the accused in the present case to show that they lack the *mens rea* of knowledge is relevant under s. 8(2) of the Evidence Act 1950 which provides as follows:

> **8. Motive, preparation and previous or subsequent conduct.**
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[20] Based on the above s. 8(2) of the Evidence Act 1950, there are two types of conduct which is relevant, namely prior and subsequent conduct. Evidence of conduct is an equivocal act and is capable of more than one interpretation. Accordingly, evidence of conduct must not be referred to in isolation. Instead, conduct must be considered with other evidence or circumstances. In the present case it can be argued that both the accused had no

knowledge about there being the said drugs in the vehicle. This is because they had not attempted to escape when they were in a position to do so upon seeing the existence of a police road block. Apart from that both the accused did not portray any form of suspicious behaviour. All these are indication of their state of mind, namely that they had no knowledge about the presence of drugs in the vehicle. On this point a comparison can be made with the factual circumstances as in the case of *Ridwan v. PP* [2010] 4 CLJ 570. In that case, the appellant was charged for the offence of drug trafficking. The appellant was seen behaving suspiciously and upon approaching the custom checkpoint, the appellant started retreating and running towards the immigration counter before he was eventually apprehended by security officers. The court found the prior conduct of the appellant before being arrested showed he was behaving suspiciously and therefore it can be inferred that he had the *mens rea* to commit the offence.

[21] In the present case both the first accused and the second accused had testified that they heard the prosecution witnesses saying "ada ganja" during the inspection of the vehicle and it was only at that moment that both of them ran away. The mere act of them running away from the scene after they heard the word "ganja" cannot be interpreted to mean that they had prior knowledge of the said drugs. This is because the conduct is also equally consistent with the act of an innocent man who was in the state of panic and trying to evade arrest when wrongly suspected of committing a crime. We find both the accused in their defence had put forward sufficient explanation as to their conduct of running away from the scene of the crime. In this regard they had therefore discharged the onus of explaining their conduct as provided for under s. 9 of the Evidence Act. (See the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717).

[22] For the reasons abovestated we find that it is not safe to convict both the accused on the charge of trafficking under s. 39B(1)(a) of the Act. However, we find that both the accused were in possession of the vehicle where the said drugs were found and applying the presumption under s. 37(d) of the Act they are deemed to be in possession of the said drugs. As the law does not permit double presumption both the accused cannot be said to be trafficking in the said drugs in the absence of any other evidence to show that there was direct trafficking. We therefore

A allow this appeal and set aside the conviction and sentence of the court below. We herein substitute it with one of possession under s. 6 of the Act and punishable under s. 39A(2) of the Act read with s. 34 of the Penal Code. In view of the large quantity of the said drugs found in possession of both the accused we sentence
B both the accused to twenty years imprisonment from the date of arrest plus the mandatory 10 strokes of whipping.

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